80-507

No.

Supreme Court, U. S.
FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

NASIR and ROSALIE RAHIN,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED

Were the petitioners denied due process of law in the forfeiture of their home to the County of Essex, State of New Jersey:

(A) When they were never notified that a hearing would be held with respect to revoking the bond which they had posted for another;

(B) When, as parties to an agreement with the State of New Jersey, they were denied notice of an application which was made to a trial court which affected their rights to their property; to wit, their dwelling house;

(C) When, as sureties on a bail bond, the petitioners were deprived of information in the hands of a prosecutor which was necessary to fulfill their duty to supervise their principal?

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No.

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vs.

STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, APPELLATE DIVISION

Petitioners respectfully pray that a writ of certiorari issue to review the final order of the Supreme Court of the State of New Jersey entered herein on May 30, 1980, denying certification of the decision of the Superior Court of New Jersey, Appellate Division, which affirmed a judgment of the trial court declaring a forfeiture of the petitioners' dwelling home.

OPINION BELOW

The order of the Supreme Court of New Jersey is appended hereto, *infra,* at p. 1a.

JURISDICTION

The final order of the Supreme Court of New Jersey was made on May 28, 1980 and entered on May 30, 1980, and is appended hereto, *infra*, at p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The principal constitutional provisions involved are the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On August 16, 1978, the petitioners, husband and wife, posted a bail bond for one, Frank Simmons, who had been charged with a crime. This bail bond took the form of a $50,000 property bond on their residence; and it is the manner in which the petitioners lost this residence which is the subject of this application.

Said bail bond constituted a judicially approved and supervised contract between the petitioners and the respondent, State of New Jersey. Under such an agreement, it is the usual practice, as determined by the trial court below, in the State of New Jersey to inform a surety, such as the petitioners, of changes in the defendant's bail status and reporting requirements. This is the only manner in which a surety can fulfill its duty to supervise a defendant who is on bail.

In violation of the usual procedure and in violation of the petitioner's right to due process of law the prosecutor in the middle of trial made a motion to revoke bail, based upon an affidavit which he had acquired some time prior to the application. In his oral application the prosecutor made

inflammatory remarks to the court about this affidavit which he knew and recognized on the record would induce the defendant, who had invariably appeared for trial, to flee. And, as predicted by the prosecutor, the defendant did flee.

Although the petitioners were parties to the bail agreement and notwithstanding the fact that the prosecutor was aware of the facts upon which his bail application was based for several days prior to the date of the application, the petitioner received no prior notice of this application which affected the security which they pledged nor were they afforded an opportunity to reassess their position with regard to the bail agreement at any meaningful time. They were deprived of any notice of these new facts which would, of necessity, have altered their position with regard to their duty to supervise the defendant.

After the defendant fled, the petitioners' security was forfeited and a judgment against the petitioners' home was entered by the trial court. The petitioners' appeal from this forfeiture was denied by the Superior Court of New Jersey, Appellate Division by order dated March 3, 1980, and certification of that order was denied by the New Jersey Supreme Court on May 30, 1980.

REASONS FOR GRANTING THE WRIT

In order for the respondents' taking of the petitioners' home to be consistent with the requirements imposed upon the State, such a procedure must have all of the elements of due process of law. *Chicago, Burlington & Quincy R.R. v. Chicago,* 166 U.S. 226, 241 (1897). This application directly presents an issue which has never before been reached by this Court, that being the status and rights of quasi-parties to litigation, who are not given notice of proceedings which affect their property rights; however, who, in the final analysis, do lose property as a result of the proceedings.

It cannot be doubted that the petitioners' loss of their home is the product of state action. Their surety contract was with the State of New Jersey, it was sanctioned and supervised by the courts of the State of New Jersey and the opportunity to give the petitioners the notice required by the guarantee of due process was solely in the hands of an assistant prosecutor. The actions of a prosecutor are certainly state actions. *Mooney v. Holman,* 294 U.S. 87 (1935).

This Court has recognized, in *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976), that:

> "'. . . (Due process, unlike some legal rules, is not a technical conception with a fixed intent unrelated in time, place and circumstances.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)."

It cannot be contested that:

> "This Court has consistently held that some form of hearing is required before an individual is finally deprived of property interest. *Wolff v. McDonald,* 418 U.S. 539, 557-558 (1974)."

Mathews v. Eldridge, supra, at p. 333.

The question presented herein is whether the notice given to the petitioners was timely and adequate. It cannot be questioned that the petitioners received absolutely no notice with regard to the bail application prior to the making of such motion. They received no notice of the application at the time that the motion was heard. Their only notice and opportunity to be heard and to

take a position with regard to their personal liability was after the defendant had fled and after they could take no action to safeguard or protect their interest.

As this Court stated in *Mathews, supra,* at p. 334 and *Cafeteria Workers, supra,* at p. 895, the requirements of due process relate to the nature of the procedural safeguards at a point in time and under the circumstances of a particular situation. In this situation the nature and opportunity for a hearing afforded to the petitioners was too late to be meaningful. The notice given to the petitioners was given after the defendant had fled. Had it been given in a timely manner the petitioners could have certainly supervised the defendant or they could have moved to withdraw their bail bond. However, it was too late after the defendant had fled, as the prosecutor had predicted at the beginning of his application. It is not due process to give a party the opportunity to "lock the barn door only after the animals have escaped."

The hearing given to the petitioners, which was after any meaningful stage of this proceeding, was meaningless. Due process guarantees a meaningful hearing at a proper time so that a party can fairly and fully deal with a situation. The petitioners, in losing their house, were not afforded this right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

s/ Robert M. Rich

HOROWITZ, BROSS
& SININS, P.A.
Attorneys for Petitioners

APPENDIX

ORDER OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
C-689 SEPTEMBER TERM 1979

Filed May 30, 1980
Stephen W. Townsend
Clerk

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NASIR and ROSALIE RAHIN,

Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3127-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 28th day of May, 1980.

s/ Stephen W. Townsend
Clerk

dp

OPINION OF THE SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
A-3127-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NASIR and ROSALIE RAHIN,

Defendants-Appellants,

and

FRANK SIMMONS a/k/a OSMAN SHARIF,

Defendant.

Argued February 20, 1980 — Decided March 3, 1980

Before Judges Matthews and Polow.

On appeal from Superior Court, Law Division, Essex County.

Robert M. Rich argued the cause for defendants-appellants (Horowitz, Bross & Sinins, attorneys; Stanley J. Hausman, on the brief).

Elliot A. Lawrence argued the cause for plaintiff-respondent (Peter G. Stewart, Essex County Counsel,

attorney; Frank Tunnero, Assistant County Counsel, of counsel and on the brief).

PER CURIAM

This is an appeal from a judgment of forfeiture of a recognizance of bail and denial of a motion to vacate or set aside the amount of bail forfeited.

The salient facts are not in dispute. Appellants Nasir and Rosalie Rahin, as sureties, executed a recognizance of bail, supported by a $50,000 property bond on their home, to secure the release on bail of defendant Frank Simmons, who had been indicted on six counts of conspiracy, armed robbery, kidnapping, threatening to take a life, extortion, and being armed. During trial, at which defendant appeared, the prosecutor moved for revocation of bail on the basis of the testimony of a previously undisclosed witness, who had been under a protective order. The prosecutor represented that her testimony would be particularly damaging to defendant's case and also show that before trial he had tried to get her to perjure herself. He asked the court's permission to produce the witness to testify in support of revocation of defendant's bail. His theory was that because of this witness' damaging testimony, defendant would attempt to leave the jurisdiction.

Since the production of the witness was a surprise to the defense, the trial judge granted a recess for defense counsel to review a previously undisclosed six-page statement given by the witness and to discuss it with Simmons. Although brought to the attention of the trial judge, he saw no need to order that defendant remain in the courtroom since he would be consulting with his attorney. During the recess while defense counsel was with defendant getting a refreshment in the hallway, defendant

fled. A bench warrant was issued for his arrest and bail was forfeited. Trial continued in his absence and defendant was found guilty of five of the six counts. Defendant is presently at large.

The motion by the county for an entry of judgment of forfeiture of bail and appellants' motion to vacate the forfeiture of bail were heard together approximately four and one-half months after trial. Under the circumstances, the trial judge found that the county was entitled to the judgment of forfeiture and further that no relief could be granted to appellants since defendant was still a fugitive. However, he did order that the judgment of forfeiture not be executed for one year to enable defendants to produce defendant.

Appellants contend that the actions of the prosecutor and trial judge at trial, without notice and without opportunity for the sureties to seek exoneration of their liability by surrendering defendant, substantially increased the risk undertaken by them and thus there was a breach of the recognizance of bail contract. In essence they allege that the prosecutor's revelation that he had a witness particularly damaging to defendant's cause and motion to revoke bail, coupled with the trial judge's refusal to order that defendant remain in court, should relieve them of any liability under the recognizance of bail contract. We find their argument unpersuasive.

The purpose of bail is to secure the release of an accused from imprisonment pending disposition of the charge and to assure his presence in court when lawfully required in connection with that charge. *State v. Rice,* 137 *N.J. Super.* 593, 599 (Law Div. 1975), aff'd o.b. 148 *N.J. Super.* 145 (App. Div. 1977). In the present case the recognizance of bail contract, in accordance with our court rules (*R.* 3:26-4(a)), expressly

provides that "the condition of this recognizance is such that if the said principal shall appear at all stages of the proceedings until final determination of the cause, unless otherwise ordered by the court, then this recognizance to be void, otherwise to remain in full force and virtue." Generally, a final determination in a criminal case occurs only upon the dismissal on the merits, an acquittal, or upon sentence after conviction. *State v. Midland Ins. Co.*, 167 *N.J. Super.* 419, 422 (App. Div. 1979), certif. den. ____ *N.J.* ____ (1979); *State v. Rice,* above, 137 *N.J. Super.* at 601.

A surety may be exonerated from the recognizance and have his obligation terminated by timely surrender of the defendant into custody at any time upon securing a proper order from the court. *R.* 3:26-7; *State v. Rice,* above, 137 *N.J. Super.* at 604; *State v. Gonzalez,* 69 *N.J. Super.* 283, 289 (App. Div. 1961). However, unless such action is taken, a surety is responsible for supervising the defendant so that he appears when required at any stage of the proceedings, *State v. Hyers,* 122 *N.J. Super.* 177, 180 (App. Div. 1973), or else run the risk of the forfeiture of bail.

In the present case appellants as sureties had the responsibility to see that Simmons was present in court on each day of trial. The State and trial judge's actions here in prosecuting and trying defendant's case can in no way be held to relieve the sureties of this burden. It was their responsibility to be aware of any turn of events in the prosecution of defendant which might increase the risk he would flee to meet their contract obligation and protect their own interests. Only in an extraordinary situation, such as where the time for a "final determination" is extended indefinitely, will it be held that the State has increased the risk of the surety unilaterally to work an alteration in the recognizance contract amounting to a breach of

contract exonerating the surety. *State v. Rice,* above, 137 *N.J. Super.* at 603-604 (and cases cited therein). No such situation existed here.

Defendants also argue that the trial judge erred in denying their motion to set aside the forfeiture on equitable grounds pursuant to *R.* 3:26-6. We disagree. The exoneration of a forfeiture, or the remission in whole or part of forfeited bail, is only to be made if a defendant is apprehended or his whereabouts discovered. *In re Midland Ins. Co.,* 167 *N.J. Super.* 237, 244 (App. Div. 1979). The factors to be taken into consideration in reaching a determination are not ascertainable until defendant is in custody. See *State v. Hyers,* above, 122 *N.J. Super.* at 180. Moreover, a remission or exoneration of bail is the inducement or incentive for a surety to locate the defendant and have him brought to justice. 8 *Am.Jr.* 2d, *Bail and Recognizance,* §169 at 875 (1963). We find no mistaken exercise of discretion by the trial judge.

The order appealed from is affirmed.

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CRIMINAL DIVISION-ESSEX COUNTY

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SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION-ESSEX COUNTY
INDICTMENT NO. 4475-77

Filed April 12, 1979
Nicholas V. Caputo
Clerk

STATE OF NEW JERSEY

Plaintiff,

vs.

FRANK SIMMONS a/k/a OSMAN SHARIF and NASIR and ROSALIE RAHIN

Defendants.

This matter having been filed with this Court by Peter G. Stewart, Essex County Counsel by Frank A. Tunnero, Assistant County Counsel on behalf of Essex County for entry of Judgment on a forfeited recognizance against the defendant Frank Simmons a/k/a Osman Sharif, as Principal and Nasir and Rosalie Rahin as Suretys, whose recognizance was forfeited

Order of the Superior Court of New Jersey, Criminal Division-Essex County

by this Court on September 21, 1978; and Stanley Hausman, Esq. appearing on behalf of said Surety in opposition and on cross motion to vacate the forfeiture and the Court having heard the arguments of counsel and considered the proofs and records of this Court and for good cause having been shown; it is on this 10 day of April;

ORDERED that Judgment be entered in favor of the State of New Jersey and its political subdivision, Essex County, and against the defendant Frank Simmons a/k/a Osman Sharif as Principal and Nasir Rahin and Rosalie Rahin as Sureties, jointly and severally in the sum of $50,000.00 plus interest from the date hereof, plus taxed costs; and it is further

ORDERED that the cross motion to vacate the forfeiture be and is hereby denied; and it is further

ORDERED , that the County of Essex shall not execute on this Judgment for one year from the date hereof except if the Sureties attempt to sell, transfer or encumber in any manner or amount, the property known as 406 Highland Avenue, Orange, New Jersey, or by further order of the Court.

s/ Nicholas Scalera
Nicholas Scalera, J.S.C.

Consented to as to form
s/ Stanley Hausman
Stanley Hausman, Esq.